Khor Cheng Wah v Sungai Way Leasing Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–70–94

GOPAL SRI RAM, SITI NORMA YAAKOB JJCA, MOKHTAR SIDIN J

17 JANUARY 1996

Civil Procedure *— Appeal — Issues abandoned before High Court — Whether could be argued in Court of Appeal*

Civil Procedure *— Default judgment — Setting aside — Delay in making application to set aside — Burden upon litigant who had delayed to render a satisfactory explanation — Discretion of court to decide whether explanation was satisfactory — Depended upon facts and circumstances of each case — Whether delay on the part of litigant's past solicitors a reasonable explanation*

Civil Procedure *— Judgments and orders — Non-compliance with one or more of the rules — Excessive interest awarded in judgment — Whether irregular or nullity — Whether amendable — Rules of the High Court 1980*

The respondent was a company which carried on the business of leasing movables. On 28 September 1983, it entered into a leasing agreement with a lessee. The appellant was one of the lessee's guarantors. The lessee later defaulted, and the respondent took out a writ on 2 October 1985, claiming, inter alia, the sums due to it; and interest thereon at the rate of 2% per month on a daily basis from 1 October 1985 until realization. The writ was then served on the lessee. An appearance was entered, but no defence was delivered. One year later, the lessee's solicitors wrote to the respondent's solicitors, giving them notice that judgment in default of defence would be entered if defence was not delivered within 48 hours. On 9 March 1988, the respondent entered judgment in default of defence. On 10 March 1994, however, the respondent took out a summons to amend the default judgment. The amendment had the effect of deleting the award of interest as claimed by the respondent, and substituting it for interest at the rate of 8% per annum from the date of judgment until the date of realization. The respondent served this summons on the appellant, and this alerted the appellant that default judgment had been entered against him. He then instructed his present solicitors who took out a summons on 5 April 1994, to set aside the judgment. The judge, in the exercise of his discretion, dismissed the appellant's summons. The appellant appealed to the Court of Appeal. The issues before the court were: (i) whether there was delay on the part of the appellant in making the application to set aside the default judgment; and (ii) whether the default judgment which awarded an excessive rate of interest to the respondent was a nullity.

Held, dismissing the appeal:

(1) The appellant was not permitted to argue matters which had been abandoned before the High Court judge. Otherwise, it would be unfair to the judge and the respondent. Moreover, this was a matter which essentially involved the exercise of discretion, and it was therefore desirable to have the views of the tribunal in whom the law vests that primary discretion (see p 229B).

(2) It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant (see p 229D–E).

(3) In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory depends upon the facts and circumstances of each case. In a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion (see p 229F) *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 followed.

(4) In the present case, the explanation of the appellant for his delay was that he placed the conduct of his defence in the hands of a solicitor who did little to protect his interests. That was not a reasonable explanation. Furthermore, the respondent had granted the appellant 18 months to deliver his pleadings before default judgment was entered (see pp 229I and 230A–E).

(5) After the coming into force of the Rules of the High Court 1980, the distinction between irregularities and nullities ceased to exist. All acts and omissions that amount to non-compliance with one or more of the rules of court result in their being curable irregularities, and not nullities. Indeed, it is quite inappropriate to say of an order or decision of a court of unlimited jurisdiction (such as the High Court and other superior courts) that it is a nullity (see p 230H); *Isaacs v Robertson* [1985] AC 97 followed.

(6) The interest rate which was stipulated in the default judgment was greater than that permitted by law. However, it was still a matter that may be cured by amendment, without any resultant prejudice to anyone (see p 231G–I); *Cheow Chew Khoon v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 and *Metroinvest Ansalt & Ors v Commercial Union Assurance Co Ltd* [1985] 1 WLR 513 followed.

(7) In any event, the judgment in this case was not irregular in any way (see p 232A); *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd* [1994] 1 MLJ 495

A [**Bahasa Malaysia summary**

Penentang merupakan sebuah syarikat yang menjalankan perniagaan memajak harta alih. Pada 28 September 1983, ia mengikat perjanjian pajakan dengan seorang penerima pajak. Perayu merupakan seorang daripada penggerenti penerima pajak tersebut. Penerima pajak tersebut
B kemudiannya ingkar, dan penentang memulakan tindakan secara writ pada 2 Oktober 1985, untuk menuntut, antara lain, jumlah yang terhutang kepadanya; dan faedah ke atasnya pada kadar 2% sebulan atas dasar harian dari from 1 Oktober 1985 hingga realisasi. Writ tersebut kemudiannya disampaikan ke atas penerima pajak. Kehadiran telah dimasukkan terhadap writ tersebut, tetapi tiada pembelaan
C yang telah dikemukakan. Satu tahun kemudian, peguamcara penerima pajakan menulis sepucuk surat kepada peguamcara perayu, memberi mereka notis bahawa penghakiman ingkar pembelaan akan dimasuki jika pembelaan tidak dikemukakan dalam tempoh masa 48 jam. Pada 9 Mac 1988, penentang telah memasuki penghakiman ingkar
D pembelaan. Walau bagaimanapun, pada 10 Mac 1994, penentang telah memohon melalui saman untuk meminda penghakiman iangkar tersebut. Pindaan tersebut mempunyai kesan membatalkan award faedahseperti yang telah dituntut oleh penentang, dan menggantikannya dengan faedah pada 8% setahun dari tarikh penghakiman sehingga tarikh realisasi. Penentang menyampaikan
E saman ini kepada perayu, and ini telah menyedarkan perayu bahawa penghakiman ingkar telah dimasuki terhadapnya. Dia kemudiannya mengarahkan peguamcaranya yang baru untuk memohon secara saman pada 5 April 1994, untuk mengenepikan penghakiman tersebut. Hakim, dalam melaksanakan budi bicaranya, menolak saman perayu.
F Perayu merayu kepada Mahkamah Rayuan. Isu-isu yang harus dipertimbangkan oleh mahkamah ialah: (i) sama ada terdapat kelambatan pada pihak perayu dalam permohonannya untuk mengenepikan penghakiman ingkar; dan (ii) sama ada penghakiman ingkar yang mengawardkan kadar faedah yang berlebihan tersebut adalah terbatal.

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Diputuskan, menolak rayuan itu:

(1) Perayu tidak dibenarkan untuk menghujah perkara yang telah dibiarkan di Mahkamah Tinggi. Jika sebaliknya berlaku, adalah tidak adil terhadap hakim dan penentang. Lagipun, ini merupakan
H suatu perkara yang pada dasarnya melibatkan pelaksanaan budi bicara, maka, adalah elok untuk menerima pendapat tribunal yang undang-undang memberikan budi bicara utama (lihat ms 229B).

(2) Adalah merupakan satu prinsip undang-undang yang utama,
I bahawa apabila seorang litigan meminta mahkamah untuk campur tangan dalam sesuatu perkara yang mengganggu haknya, dia harus melakukannya dalam masa yang dibenarkan. Sungguhpun maxim *vigilantibus, non dormientibus, jura subveniunt*, berasal dari

Mahkamah Canseri, ia boleh dipakai sejagat. Walaupun dalam kes di mana hak boleh dilaksanakan secara ex debito justitiae, mahkamah boleh enggan memberikan relief kepada seorang litigan yang malas (lihat ms 229D–E). A

(3) Dalam semua kes di mana kelambatan dalam membuat permohonan di mahkamah merupakan satu isu, beban adalah terletak di atas litigan yang lambat tersebut untuk memberikan satu penerangan yang memuaskan untuk kelambatannya. Sama ada penerangan dalam suatu kes adalah memuaskan atau tidak bergantung kepada fakta dan keadaan kes tersebut. Jika suatu perkara itu melibatkan pelaksanaan budi bicara, keputusan adalah terletak pada hakim yang diberikan budi bicara tersebut oleh undang-undang (lihat ms 229F) *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 diikut B C

(4) Dalam kes ini, penerangan perayu terhadap kelambatannya ialah bahawa dia telah meletakkan pengendalian pembelaannya kepada peguamcaranya yang hanya membuat apa yang minima untuk melindungi kepentingannya. Ini bukan merupakan suatu penerangan yang munasabah. Selain daripada itu, penentang juga telah memberikan perayu 18 bulan untuk mengemukakan plidingnya, sebelum penghakiman ingkar dimasuki (lihat ms 229I dan 230A–E). D E

(5) Setelah Kaedah-Kaedah Mahkamah Tinggi 1980 berkuatkuasa, perbezaan antara luar aturan dan pembatalan tidak lagi wujud. Kesemua tindakan dan peninggalan yang merupakan ketidakpatuhan satu atau lebih daripada satu kaedah mahkamah merupakan luar aturan yang boleh dibetulkan, dan bukannya pembatalan. Sesungguhnya, adalah tidak sesuai untuk mengatakan bahawa suatu perintah atau keputusan mahkamah yang mempunyai bidang kuasa yang tidak terbatas (misalnya Mahkamah Tinggi dan mahkamah atasan yang lain) bahawa ia adalah suatu pembatalan (lihat ms 230H); *Isaacs v Robertson* [1985] AC 97 diikut. F G

(6) Kadar faedah yang dinyatakan dalam penghakiman ingkar yang berkenaan adalah lebih daripada apa yang telah dibenarkan oleh undang-undang. Walau bagaimanapun, ia masih merupakan suatu perkara yang boleh dibetulkan oleh pindaan tanpa memprejudiskan sesiapa (lihat ms 231G–I); *Cheow Chew Khoon v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 dan *Metroinvest Ansalt & Ors v Commercial Union Assurance Co Ltd* [1985] 1 WLR 513 diikut. H

(7) Sesungguhnya, penghakiman ingkar yang berkenaan adalah tidak luar aturan (lihat ms 232A) *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd* [1994] 1 MLJ 495 diikut.] I

A **Cases referred to**

Cheow Chew Khoon v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457

Isaacs v Robertson [1985] AC 97

Metroinvest Ansalt v. Commercial Union Assurance Co Ltd [1985] 1 WLR 513

B *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30

[*Editorial Note*: The appellant has applied for leave to appeal to the Federal Court vide Civil Application No 08–84–995.]

C

Notes

For cases on judgments and orders, see 2 Mallal's Digest (4th Ed, 1994 Reissue) paras 1824–2065.

For cases on appeals, see 2 Mallal's Digest (4th Ed, 1994 Reissue)

D paras259–699.

Legislation referred to

Rules of the High Court 1980

E **Appeal from**: High Court, Pulau Pinang (Civil Suit No 22–1193–1985.)

Louis Van Buerle (Cheong Wai Meng & Van Buerle) for the appellant
Gerard Chan (Lim Kean Siew & Co) for the respondent

F *Cur adv Vult*

Gopal Sri Ram JCA (delivering the judgment of the court): This is an appeal against the decision of Azmel J, delivered in the High Court at Penang, refusing an application by the appellant (the fourth defendant in the court below) to set aside a default judgment entered against him. For convenience, I shall refer to the parties according to the title assigned to them in the court below.

G

This appeal was heard and dismissed on 20 November 1995. The reasons now follow.

H *Facts and chronology*

The plaintiff (the respondent before this court), as its name suggests, carries on the business of leasing movables. On 28 September 1983, it agreed to lease certain equipment to the first defendant (a limited company). The agreement was in writing. The other defendants guaranteed the due

I performance of the terms of the leasing agreement.

The first defendant did not meet its obligations under the leasing agreement. So, the plaintiff took out a writ on 2 October 1985, claiming

the sums due to it and other ancillary relief. Its statement of claim contained the following indorsement:

> 12 Wherefore the plaintiff claims against the defendants for:
>
> (a) the said sum of RM82,954.68;
>
> (b) interest thereon at the rate of 2% per month on a daily basis from the 1 October 1985 until realization;
>
> (c) other monies sums costs and expenses incurred by the plaintiff;
>
> (d) costs; and
>
> (e) such further and/or other relief as this honourable court may deem fit and proper.

The writ was served on Messrs Goh Bean Sim & Partners, Advocates & Solicitors, who had been nominated by the defendants to represent them in the suit. An appearance was entered to the writ. However, no defence was delivered within the time limited by the rules.

On 17 October 1986, that is to say, almost one year after the issue of the writ, the plaintiff's solicitors wrote to the defendants' solicitors giving them notice that unless the defence was delivered within 48 hours therefrom, judgment in default of defence would be entered. Nothing further appears to have transpired until 30 April 1987, when the plaintiff's solicitors filed a certificate stating that the defendants had defaulted in delivering their defence. Then, on 9 March 1988, the plaintiff entered judgment in default of defence. This judgment gave to the plaintiff the relief it had claimed in prayers (a), (b), (c) and (d) of para 12 of its statement of claim.

The next event took place on 10 March 1994. On that day, the plaintiff took out a summons to amend the default judgment entered on 9 March 1988. The amendment had the effect of deleting the award of interest as claimed in prayer (b) of the statement of claim, and substituting therefor interest at the rate of 8% per annum from the date of judgment until the date of realization.

The plaintiff served this summons on the fourth defendant. This obviously had the effect of waking him from the deep slumber into which he had fallen for the best part of the preceding six years. He made a search of the court docket and found that judgment in default of defence had been entered against him. He then instructed his present solicitors who took out a summons on 5 April 1994, to set aside the judgment.

The fourth defendant's summons came up for disposal before Azmel J on 11 May 1994. Although the fourth defendant raised several matters in the affidavits he delivered, arguments before the learned judge were confined to only two issues. The first of these was the interest point. The second was the delay in making the application to discharge the ex parte judgment. The notes recorded by the learned judge bear this out.

The learned judge, after hearing submissions, reserved his decision until 12 July 1994, when he, in the exercise of his discretion, dismissed the fourth defendant's summons.

The appeal

When he opened his arguments on the appeal, Encik Van Buerle attempted to argue matters which had been obviously abandoned before the learned judge. He was not permitted to adopt this course. It would have been plainly unfair to the learned judge and to the plaintiff for this court to consider the appeal on the basis of a point upon which the fourth defendant had, by his conduct, precluded the judge from expressing his view. Moreover, this is a matter which essentially involved the exercise of discretion and it is therefore desirable, if not essential, to have the views of the tribunal in whom the law vests that primary discretion.

Counsel for the fourth defendant was therefore left with the two issues that were argued before the learned judge. I shall consider them in the order in which they were presented during argument.

The delay point

It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant.

In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. It is a decision of the Federal Court and therefore quite plainly binds this court.There, Edgar Joseph Jr FCJ, said (at p 36):

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justicie, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O 2, r 2(i) of the Rules of the High Court, 1980.)

In the present case, the explanation of the fourth defendant for the delay in making his explanation is, to summarize his affidavits, that he placed the conduct of his defence in the hands of a solicitor who did little to protect his client's interests.

Is that a reasonable explanation? The learned judge did not think it was. And I agree with him. Undoubtedly, this court will not, whenever feasible, allow a client to suffer for the negligence of his solicitor: see, *Cheow Chew Khoon v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 at p 490, per VC George JCA

But there are limits to what may be done in the interests of justice. After all, justice is not only for a defaulting defendant: it is for the plaintiff as well. And at the end of the day, a careful examination of the facts and circumstances reveals that the fourth defendant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. Surely, it would be injustice to visit the consequences of his indifference upon the plaintiff's head.

There is another factor in this case which turns the scales against the defendant. In fairness to the plaintiff and its solicitors, it must be said of them that they granted to the fourth defendant's solicitors every indulgence in the matter of the delivery of pleadings. The chronology to which I earlier alluded reveals that after warning the defendants' solicitors, they waited for about 18 months before entering default judgment. It is a harsh result indeed if they are to be punished for this.

Once the question of delay is resolved against the fourth defendant, there was little left to be argued upon the question of merits. Nevertheless, I shall examine the second issue raised by the fourth defendant.

Excessive interest

Neither the note taken down by the learned judge nor his judgment disclose that the fourth defendant had argued that the judgment in this case was irregular and ought to be set aside. However, in fairness to counsel who argued the case in the court below (not Encik Van Buerle), there is a reference, both in the judgment and in the note, to an argument that the rate of interest was excessive, and that the judgment was not amenable to amendment.

Previously, courts, in respect of their process and orders, maintained a distinction between irregularities and nullities. The former were curable, but the latter were not. This distinction did not lend much clarity to the law. Neither did it, in the preponderance of cases, advance the course of justice.

After the coming into force of the Rules of the High Court 1980, the distinction between irregularities and nullities ceased to exist. All acts and omissions that amount to non-compliance with one or more of the rules of court result in their being curable irregularities and not nullities. Indeed it is quite inappropriate to say of an order or decision of a court of unlimited jurisdiction (such as the High Court and other superior courts) that it is a nullity.

The point, I believe, has been so well put by Lord Diplock in *Isaacs v Robertson* [1985] AC 97 at p 102 (PC), that I can scarce do better than to quote his words:

A Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction B between orders to which the descriptions 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v Marsh* [1945] AC 271 at p 284 and *MacFoy v United Africa Co Ltd* [1962] AC 152 at p 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited C jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; what they do support is the quite different proposition that there is a category of orders of such a court D which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously E refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

The contrasting legal concepts of voidnesss and voidability form part of the English law of contract. They are inapplicable to orders made by a court F of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it upon application to that court; if it is regular, it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.

G In *Cheow Chew Khoon*, at pp 481–482, I expressed the view that a judgment that was entered for too much was not a nullity but a mere irregularity, and that it was amenable to amendment in the circumstances there adumberated. In coming to that conclusion upon the law, I accepted the approach adopted by Cumming-Bruce LJ in *Metroinvest Ansalt v Commercial Union Assurance Co Ltd* [1985] 1 WLR 513. Having read the authorities, including H the more recent ones, once again, the view I there expressed is one to which I propose to adhere.

For the purpose of this appeal, I shall assume, without deciding, in the fourth defendant's favour, that the default judgment was entered for too much because the interest rate there stipulated was greater than that I permitted by law. It is still a matter that may be cured by amendment without any resultant prejudice to anyone. The plaintiff had applied to just that. It was that application which alerted the fourth defendant, and he moved to set aside the whole of the judgment.

But I must say that I am in agreement with the judge that the judgment is not irregular in any way. In arriving at that conclusion he relied on the judgment of Edgar Joseph Jr SCJ delivered in the Supreme Court in *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd* [1994] 1 MLJ 495. I think that he was right in doing so. It is an authority binding upon him as it is upon this court.

Conclusion

Having come to the conclusion that this appeal was devoid of any merit, it was dismissed without the necessity of calling upon counsel for the plaintiff. The order of the learned judge was affirmed. The costs of the appeal were awarded to the plaintiff, and the deposit in court was ordered to be paid out to the plaintiff to account of its taxed costs.

Appeal dismissed.

Reported by Isabel Liong